88- 1834

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PENNZOIL COMPANY and
VERMEJO PARK CORPORATION,
Petitioners,

v.

LOUIS KESTENBAUM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Of Counsel:

PAUL L. MITCHELL
MARIA L. WYCKOFF
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

RON D. DAUGHERTY
P. O. Box 2967
Houston, Texas 77252-2967
(713) 546-8825

L. CHAPMAN SMITH
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1546

Counsel of Record
for Petitioners

May 15, 1989

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED

Whether, in a suit by a male, former managerial employee alleging discharge in breach of an implied employment contract, a state court can, consistent with the due process and supremacy clauses of the United States Constitution, impose substantial liability on the manager's former employer for breach of contract, notwithstanding the fact that the employer discharged the manager on the basis of an investigation and a good faith belief that the manager was guilty of sexual harassment and sexual favoritism in violation of Title VII of the Civil Rights Act of 1964.

RULE 28.1 LIST

Pennzoil Company has no parent company or affiliates. The non-wholly-owned subsidiaries of Pennzoil are: The Eureka Pipe Line Company, Purolator of India, Inc., Royal Filter Manufacturing Company, Proven Properties, Inc., 10 Minute Service Centres Limited, American Sulphur Export Corporation, P.T. Sungai Kencana, P.T. Indo Muro Kencana, Pennzoil (U.K.) Limited, Facet FCE S.A.R.L., and Facet Iberica, S.A. Vermejo Park Corporation has as its parent companies Richland Development Corporation and Pennzoil Company. The affiliates of Vermejo Park Corporation are: Purolator of India, Inc., Royal Filter Manufacturing Company, The Eureka Pipe Line Company, Proven Properties, Inc., 10 Minute Service Centres Limited, American Sulphur Export Corporation, P.T. Sungai Kencana, P.T. Indo Muro Kencana, Pennzoil (U.K.) Limited, Facet FCE S.A.R.L., and Facet Iberica, S.A.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
RULE 28.1 LIST	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES INVOLVED	2
REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
I. Statement of Facts	4
II. Federal Questions Raised Below	7
REASONS FOR GRANTING THE WRIT	11
I. Introduction	12
II. Supremacy Clause	13
III. Due Process Clause	17
IV. Title VII	20
V. Federal Public Policy	25
VI. Proposed Rule of Law	26
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984)	22
California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987)	16
College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 508 N.E.2d 587 (Mass 1987)	24
Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987)	13
French v. Mead Corp., 33 Fair Empl. Prac. Cas. (BNA) 635 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985)	19, 21
Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380 (5th Cir. 1987)	13, 21
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)	20
McBrearty v. United States Taxpayers Union, 668 F.2d 450 (8th Cir. 1982)	26
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	27
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)	13
Mughal v. Chart House, Inc., 40 Fair Empl. Prac. Cas. (BNA) 626 (N.D. Ill. 1986)	19
Mughal v. Chart House, Inc., No. 85-C-5396 (N.D. Ill. Aug. 27, 1986) (WESTLAW, Allfeds database)	17
Munford v. James T. Banes & Co., 441 F. Supp. 459 (E.D. Mich. 1977)	14
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	16
Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1982)	14
Steele v. Offshore Ship Building, Inc., 867 F.2d 1311 (11th Cir. 1989)	22
Stockley v. AT&T Information Systems, Inc., 687 F. Supp. 764 (E.D.N.Y. 1988)	23
Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987)	22
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	27
United States v. Mississippi Valley Co., 364 U.S. 520 (1961)	25
Wendorf v. Metropolitan Life Ins. Co., 47 Empl. Prac. Dec. (CCH) ¶ 38,316 (E.D.N.Y. 1988)	23

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. art. VI, cl. 2	1, 13
U.S. Const. amend. XIV, § 1	2, 17
STATUTES	
42 U.S.C. § 2000e-2(a)(1)	2
42 U.S.C. § 2000e-7	2, 15
REGULATIONS	
29 C.F.R. § 1604.11(d)	3, 14
29 C.F.R. § 1604.11(g)	3, 14
45 Fed. Reg. 74677 (1980)	14

OPINIONS BELOW

The opinion of the New Mexico Supreme Court is reported at 766 P.2d 280 and is reprinted in Appendix A at pages 1a-21a. The order of the New Mexico Supreme Court denying Pennzoil's Motion for Rehearing is reprinted in Appendix B at page 22a. The judgment of the Eighth Judicial District Court of Colfax County, Judge Leon Karelitz presiding, which awarded respondent Louis Kestenbaum $500,000 in damages plus his costs and post-judgment interest, has not been reported. It is reprinted in Appendix C at pages 23a-24a.

JURISDICTION

The judgment of the New Mexico Supreme Court, entered on November 30, 1988, affirmed the judgment of the Eighth Judicial District Court of Colfax County, Judge Leon Karelitz presiding, entered on behalf of respondent Louis Kestenbaum on December 4, 1986. The New Mexico Supreme Court denied Pennzoil Company's timely petition for rehearing on January 13, 1989. On March 15, 1989, Justice White signed an order extending the time for filing this petition for writ of certiorari to and including May 15, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges and every State shall be bound thereby, any Thing in the

> Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, § 1 of the United States Constitution reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

STATUTES INVOLVED

Section 2000e-2 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), reads in pertinent part as follows:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-7 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-7, reads as follows:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

REGULATIONS INVOLVED

Section 1604.11(d) of the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d), reads as follows:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Section 1604.11(g) of the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(g), reads in pertinent part as follows:

> Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who are qualified for but denied that employment opportunity or benefit.

STATEMENT OF THE CASE

The issue in this case is whether, in a suit by a male, former employee alleging breach of an implied employment contract, a state court can impose substantial liability on his employer for discharging him because of its good faith belief, formed after an extensive investigation, that he had engaged in sexual harassment of female employees.

Numerous courts have supported employers' discharges of employees on the basis of evidence gained through investigations of alleged violations of Title VII; indeed, the Equal Employment Opportunity Commission Guide-

lines concerning sexual harassment mandate prompt and effective employer action. In direct contravention of these decisions, the New Mexico Supreme Court imposed severe liability on Pennzoil following Pennzoil's thorough investigation of numerous allegations of sexual harassment and favoritism by Mr. Kestenbaum and its subsequent discharge of Mr. Kestenbaum as a result of the evidence gathered from this investigation.

I.

Statement of the Facts

Pennzoil hired Mr. Kestenbaum in March of 1977 to serve as a Manager in charge of guest operations of the Vermejo Park Corporation ("Vermejo Park"). At the time his employment was terminated, Mr. Kestenbaum served as a Vice President of Vermejo Park. Transcript at 1876, 1885-86. Vermejo Park is a guest ranch in northern New Mexico that provides food and lodging as well as hunting, fishing, and other recreational activities for its guests. An important part of Mr. Kestenbaum's job at Vermejo Park involved the hiring and supervision of several young female employees, many of whom worked at Vermejo Park on a temporary basis. Mr. Kestenbaum hired these employees to fill maid and waitress jobs at Vermejo Park.

In January of 1984, the President of Pennzoil received an anonymous letter signed by "a concerned parent of an employee." Transcript, Plaintiff's Exhibit No. 1. This letter contained numerous serious allegations of sexual harassment and sex-based favoritism by Mr. Kestenbaum toward several of the young female employees at Vermejo Park. *Id.* After receiving this letter, Pennzoil immediately undertook its duty to investigate these allegations imposed by Title VII and the Equal Employment Opportun-

ity Commission Guidelines regarding sexual harassment and sex-based favoritism. Transcript at 1507.

Mr. Paul Rundle, who was Vice President of Administration of Pennzoil and had been a professional investigator for approximately twenty years, requested that two representatives of Pennzoil investigate the allegations contained in the letter. Pennzoil's Equal Employment Opportunity and Affirmative Action Coordinator, Ms. Rebecca McCormick, and Mr. Richard Lew, a Senior Security Representative in Pennzoil's Security Department, were selected to conduct the initial investigation.[1]

Ms. McCormick and Mr. Lew were instructed by Mr. Rundle to go to Vermejo Park and interview all of the female employees who currently worked there. Ms. McCormick and Mr. Lew were also instructed to attempt to interview the female employees who no longer worked at Vermejo Park but who had worked there at the time of the allegations contained in the anonymous letter. Transcript at 1433. In the end, the investigation consisted of interviews, in person and by telephone, with twenty-seven current and former employees, including the one former employee whom Mr. Kestenbaum himself described as having knowledge of the facts at issue. Transcript at 1513, 1583.

Several precautions were taken by Ms. McCormick and Mr. Lew in order to insure the accuracy and validity of each interview and the investigation as a whole. All

---

1. Ms. McCormick had extensive experience in conducting interviews during her five years as a personnel representative. Mr. Lew, a former United States Customs Services investigator, also had extensive investigative experience as a result of his employment with the Customs Service and Pennzoil. Mr. Lew had conducted approximately 120 investigations during his tenure with Pennzoil and had interviewed numerous witnesses in connection with these investigations. Transcript at 380-84.

persons being interviewed were told that all conversations would be strictly confidential. Transcript at 246. At no time did the investigators initially mention Mr. Kestenbaum's name to any person being interviewed. Instead, Mr. Kestenbaum's name was only used during an interview if the person being interviewed had first mentioned his name. Transcript at 247. Both Ms. McCormick and Mr. Lew took notes of each interview. Transcript at 249. The investigators chose to conduct personal interviews, rather than merely obtain written statements, because they believed interviews would produce more open and frank discussions. Transcript at 391.

As a result of the investigation conducted by Ms. McCormick and Mr. Lew, the allegations of sexual harassment and favoritism by Mr. Kestenbaum contained in the anonymous letter were repeatedly substantiated. Several witnesses stated that Mr. Kestenbaum had made sexual advances toward female employees without those employees' consent. Those advances were made toward several young female employees on numerous occasions. Transcript at 345-47, 367-68, 448-49, 491-93. Allegations of sex-based favoritism accompanied statements by current and former Vermejo Park employees that Mr. Kestenbaum treated employees who had succumbed to his sexual advances more favorably than those who had rejected his sexual advances. Transcript at 335, 362, 438-39, 498-99, 1116, 1517-18. Such allegations of favoritism were reported by female as well as male employees. Transcript at 488.

The investigation also revealed that certain allegations contained in the anonymous letter were not true. Furthermore, Ms. McCormick and Mr. Lew detected that some of the employees were biased against Mr. Kestenbaum,

and they discounted the reports of these employees accordingly. Transcript at 249-50, 1621.

After completing the interviews with current and fomer employees of Vermejo Park, Ms. McCormick and Mr. Lew briefed several members of Pennzoil management, including Mr. Rundle, about their findings. Shortly thereafter, Mr. Kestenbaum met with Mr. Rundle. Transcript at 1533-34. During this meeting and others held during the same week, Pennzoil officials informed Mr. Kestenbaum of the results of the interviews and encouraged him to respond to the charges made. Mr. Kestenbaum responded by merely denying that he had engaged in any inappropriate behavior, thereby placing Pennzoil in the position of having to make a credibility determination. Transcript at 1537-38.

As a result of the findings of the investigation and Mr. Kestenbaum's subsequent responses to these findings, Mr. Rundle in good faith believed that Mr. Kestenbaum had sexually harassed and exercised sexually-based favoritism toward several female employees at Vermejo Park. On the basis of this belief formed after the above investigation, Pennzoil decided to discharge Mr. Kestenbaum, and did so effective February 17, 1984. Transcript at 1557-59.

II.

Federal Questions Raised Below

At all stages of the proceeding below, Pennzoil consistently took the position that the state court could not impose liability on it for its actions with respect to Mr. Kestenbaum because those actions were required by Title VII, and that the requirements of the federal civil rights laws must take precedence over any state law contract rights which Mr. Kestenbaum may have had.

In Defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment on Claim of Intentional Interference with Contractual Relations, filed with the trial court on September 15, 1986, Pennzoil stated that

> the existence of a legal duty to investigate allegations and take prompt appropriate actions precludes a claim that the Defendants utilized improper means. Rather, the Defendants did what was legally required of them. To hold otherwise will necessarily undermine the enforcement of Title VII's proscription of sexual harassment. To hold that the Defendants conduct was improper will mean that performance of a legal duty is also improper.

This motion was denied by the trial court. Transcript at 142-43.

Similarly, in Defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment on Claim for Breach of Implied Employment Contract, filed with the trial court on September 15, 1986, Pennzoil stated:

> If an employer must have only undisputed and uncontroverted evidence, then it can never act on allegations of sexual harassment. If the allegations are true, and an employee can prove them by a preponderance of the evidence, then the employer will then become liable for sexual harassment if it fails to act. If Plaintiff's claim has merit, however, then an employer will be equally liable if it does act. Therefore, the employer would be placed in the untenable position of necessary liability no matter what it did in response to allegations of sexual harassment. . . . The Defendants acted as required

> by law in response to allegations of sexual harassment. An employer must be allowed to act to protect its own interests.
>
> The Defendants had a legal duty to investigate the allegations of sexual harassment, and had a legal duty to take prompt remedial action.

This motion was also denied by the trial court. Transcript at 51.

In Defendants' Pretrial Statement, filed with the trial court on August 27, 1986, Pennzoil specifically informed the trial court that Title VII and the Equal Employment Opportunity Commission Guidelines concerning sexual harassment were an issue in the case. Pennzoil stated that "the following regulations and statutes, other than New Mexico statutes, are involved in this matter: "(a) 42 U.S.C. § 2000e ('Title VII'); (b) 29 C.F.R. § 1604.11 (1985) ('EEOC Guidelines'). . . ."

In support of its Motion for a Directed Verdict, submitted at the close of Mr. Kestenbaum's case in chief, Pennzoil argued that any duty it owed Mr. Kestenbaum must be balanced against its duty under Title VII to protect its employees from sexual harassment in the workplace. Transcript at 2177-78. Pennzoil's motion for a directed verdict was denied by the trial court. Transcript at 2192.

During the jury instructions settlement conference, the trial court denied two jury instructions vital to Pennzoil's defense. Transcript at 2482-85, 2487-91. Defendants' Requested Jury Instruction Number 14 stated: "Where an employee engaged in conduct which is illegal, there is 'just cause' for termination of the employment relation-

ship with the employee." The second refused instruction, Defendants' Requested Jury Instruction Number 15, stated: "Where an employee is terminated for just cause, the employer does not have to prove that the cause in fact existed. Rather, the employer need only in good faith believe that the employee engaged in conduct which was inappropriate in the work place."

Pennzoil also stated in response to the trial court's refusal to submit its requested jury instructions numbers 14 and 15, that

> [s]ince this case involves sexual harassment, it is especially important that the Defendants not have to prove, but need only reasonably believe in good faith that the sexual harassment existed. . . .
>
> Moreover, an employer should not be required to prove, by a preponderance of legally sufficient evidence, that an employee is guilty of sexual harassment. Most employers are not attorneys, and are not adept at what is legally sufficient evidence. Also, an employer is faced with his own potential liability if he fails to act. By requiring the employer to prove the reason existed, the Court guarantees that the employee will be sued either by the fired employee or by the victim of sexual harassment. Such a ruling will also frustrate the purpose of Title VII by handcuffing employers and restricting their ability to prevent sexual harassment where they see evidence that it is occurring.

This motion was denied by the trial court on January 13, 1987.

Defendants' Memorandum of Law in Support of Motion for Judgment Notwithstanding the Verdict and In The Alternative for a New Trial, filed with the trial court on December 15, 1986, stated: "Upon receiv-

ing an allegation of sexual harassment, the employer has a duty to investigate and take prompt appropriate remedial action. The employer must be concerned not only with the well being of its employees, but also with its own potential liability."

In its Brief-in-Chief submitted to the New Mexico Supreme Court, Pennzoil asserted and relied upon its duty under Title VII to protect its employees from sexual harassment, stating that this duty was superior to any duty owed Mr. Kestenbaum as an individual. The New Mexico Supreme Court did not directly respond to Pennzoil's reliance upon this federal duty in its opinion.

Finally, in Pennzoil's Brief in Support of its Motion for Rehearing before the New Mexico Supreme Court, Pennzoil again specifically raised a federal question in its discussion of its duties under Title VII. At this time, Pennzoil also specifically stated that the decision of the New Mexico Supreme Court deprived Pennzoil of its rights under the supremacy clause and the due process clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

This Court should grant Pennzoil's Application for Writ of Certiorari to the Supreme Court of the State of New Mexico because the judgment of the court below violates the supremacy clause of the United States Constitution, the due process clause of the fourteenth amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, and federal public policy. Furthermore, certiorari should be granted in this case because the New Mexico Supreme Court decided an important question of federal law which has not been,

but should be, settled by this Court. In addition, the New Mexico Supreme Court decided the federal questions below in a manner that conflicts with applicable decisions of this Court and the federal courts of appeals.

I.

Introduction

This Court should grant certiorari in this case to preserve the supremacy of the federal civil rights laws. The judgment below, which was based on the breach of an implied contract of employment under state law, is inconsistent with Title VII, since Pennzoil's actions, which formed the basis for the jury's finding of breach of contract, were required by Title VII. The state law contract cause of action is plainly inconsistent with Title VII and is therefore preempted. This Court should make clear that a state court may not, consistent with the supremacy clause, impose liability on an employer for taking actions required by the federal civil rights laws.

Similarly, this case should be heard by this Court so that Pennzoil and other employers may know the standard of conduct which will subject them to liability under state and federal law. Under the judgment of the courts below, an employer may be liable under state law if it discharges a supervisor for alleged sexual harassment, and liable to other employees under federal law if it fails to discharge the supervisor. Indeed, the practical result of the judgment below is that an employer is potentially liable no matter what action it takes, despite conducting an extensive investigation and having a good faith belief in the correctness of its actions. This Court should make clear that such absolute, conflicting, or unpredictable liability is simply not the law.

Certiorari should also be granted in this case so this Court can correct the clear misinterpretation of federal law by the court below, which held, in essence, that an employer investigating charges of sexual harassment must utilize state-of-the-art, professional investigative techniques. This implicit holding of the court below is contrary to the decision of every federal court to address the standards of an employer's investigation of charges of sexual harassment and, if allowed to stand, would impose substantial burdens on employers who attempt to comply with Title VII.

Finally, this Court should decide this case to clearly hold that any contract, whether express or implied, which purports to prohibit an employer from taking actions required by Title VII is void as contrary to public policy as expressed in the federal civil rights laws.

II.

Supremacy Clause

The judgment of the court below violates the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and is therefore preempted by federal law, because Pennzoil's actions in investigating the charges of sexual harassment and discharging Mr. Kestenbaum, for which Pennzoil was found liable for breach of contract, were required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), as that Act has been interpreted by this Court, *see Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72-73 (1986), and the United States Court of Appeals, *see Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 n.3 (5th Cir. 1987); *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 387-88 (5th Cir. 1987). Further-

more, at the time Pennzoil conducted its investigation of the sexual harassment and favoritism charges against Mr. Kestenbaum and terminated his employment after verifying the charges, Pennzoil was attempting to comply with the Equal Employment Opportunity Commission Guidelines concerning sexual harassment, which stated:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows . . . of the conduct, *unless it can show that it took immediate and appropriate corrective action.*
>
> . . . Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

29 C.F.R. § 1604.11(d), (g) (1988)(initially published at 45 Fed. Reg. 74677) (1980)(emphasis added).

The burden imposed by these regulations has been consistently upheld. In *Munford v. James T. Banes & Co.*, the court stated that the "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior. . . . [A]n employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel." 441 F. Supp. 459, 466 (E.D. Mich. 1977). Similarly, an employer's failure to investigate an employee's allegations of sexual harassment was deemed evidence of the employer's acquiescence to such unlawful actions in *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857, 862-63 (N.D. Ohio 1982).

Title VII and the Equal Employment Opportunity Commission Guidelines clearly imposed a duty on Pennzoil to investigate the allegations of sexual harassment and sex-based favoritism and to take appropriate action to eliminate those practices from the workplace. Pennzoil did just that. In complying with its duty under Title VII, Pennzoil promptly conducted a thorough investigation and took disciplinary action that it correctly and in good faith believed was required by federal law under the circumstances. Since the actions for which Pennzoil was found liable were required by federal law, and the judgment finding Pennzoil liable for those same actions was based on state law, the supremacy clause and the doctrine of preemption mandate that the state court judgment give way to federal law.

It is clear that the common law contract claims upon which the judgment in this case was based are preempted by federal law to the extent that they are inconsistent with Title VII. Although this Court has held that Title VII does not preempt *consistent* state laws, and states are free to provide additional remedies to the victims of discrimination, it is beyond dispute that inconsistent state laws are preempted by Title VII. Title VII provides:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.*

42 U.S.C. § 2000e-7 (emphasis supplied). This Court, in interpreting this language, has held that Title VII preempts inconsistent state laws. This Court stated:

> As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because 'compliance with both federal and state regulations is a physical impossibility' . . . or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'
>
> . . .
>
> This third basis for pre-emption is at issue in this case. In two sections of the 1964 Civil Rights Act, . . . Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law.

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987).

Furthermore, this Court has repeatedly held that the doctrine of preemption applies not only to inconsistent state statutes and regulations, but also to inconsistent state common law causes of action and judicial remedies. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 49-57 (1987) (common law claim of tortious breach of contract preempted by ERISA).

The contract cause of action at issue in this case is clearly preempted by Title VII because compliance with both Title VII and the common law contract obligation the New Mexico Supreme Court found would have been impossible, and because Mr. Kestenbaum's contract cause of action, upon which the judgment below was based, stands as an obstacle to the accomplishment of the full purposes and objectives of Congress when it enacted Title VII.

The contract obligations asserted by Mr. Kestenbaum purport to require or permit the doing of an act which would be an unlawful employment practice under Title VII. Because the common law causes of action upon which the judgment in this case was based are inconsistent with Title VII, they are preempted by federal law and the judgment below is void. This Court should grant petitioner's application for writ of certiorari to maintain the supremacy of federal law in the vitally important area of employment discrimination.

III.

Due Process Clause

The judgment below also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by imposing liability on Pennzoil under state law for taking actions which federal law required it to take. This situation placed Pennzoil, and will place similarly situated employers, in the position of being potentially liable under state law if they act in good faith in discharging a supervisor accused of sexual harassment and potentially liable under federal law if they do not discharge the supervisor. Such inconsistent, uncertain, and unpredictable liabilities are fundamentally unfair and constitute a violation of due process of law. U.S. Const. amend. XIV, § 1.

In *Mughal v. Chart House, Inc.*, No. 85-C-5396 (N.D. Ill. Aug. 27, 1986)(WESTLAW, Allfeds database), the court correctly stated that an employer in a situation similar to the one in which Pennzoil found itself is "placed in a catch-22 situation." Slip op. at 9. The employer in *Mughal* discharged the plaintiff after one of its managers

investigated several charges of sexual harassment which had been directed against the plaintiff. In turn, the plaintiff, who was Pakistani, sued the employer under Title VII and 42 U.S.C. § 1981 for unlawfully discharging him because of his national origin. The court reasoned persuasively that the employer "should not be penalized for carrying out the purposes of Title VII." *Id.* The court stated:

> If defendant fired plaintiff he could charge discrimination. . . . If it did not fire plaintiff it could be subject to liability arising from future incidents of sexual harassment. . . . It is difficult to conceive of a discharge that sounds less in discriminatory intent than plaintiff's discharge.

Id. Consequently, the court denied the plaintiff's claims of discriminatory discharge. *Id.* The penalizing of an employer who has taken actions required by federal law is so fundamentally unfair that it denies the employer due process of law.

Furthermore, the imposition of civil liability under state law because Pennzoil took certain actions and the simultaneous potential imposition of liability under federal law if Pennzoil had failed to take those same actions failed to give Pennzoil, and will fail to give similarly situated employers, fair notice of the conduct that will subject them to deprivation of property under state or federal law. This absence of fair notice of prohibited conduct also violates the due process clause.

Numerous courts have discussed the inherent unfairness that would arise if a jury were allowed to second-guess an employer's decision to terminate an employee when the employer believes in good faith that the em-

ployee has sexually harassed other employees. In *French v. Mead Corp.*, the court held that Mead's termination of the plaintiff as a result of its belief that the plaintiff had engaged in sexual harassment was appropriate and did not constitute a wrongful discharge. 33 Fair Empl. Prac. Cas. (BNA) 635 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985). The court analyzed Mead's investigation, which involved interviews with seven victims and observers of plaintiff's alleged sexual harassment of a fellow employee as well as discussions with three women who had no knowledge of such harassment, and concluded that the investigation was adequate. The court reasoned that, although the investigation could have been even more thorough, "it was not so inadequate that it can be found that action taken thereafter was unreasonable." *Id.* at 639. The court stated further that

> even though the Court may have reached conclusions different from those of the Mead managers, it is not and should not be the Court's function to substitute its judgment for theirs *unless their judgment is unreasonable or exercised in bad faith.*
>
> . . .
>
> Whether or not [the plaintiff's] conduct can be characterized as sexual harassment is not critical. *What is critical is whether or not the defendant employer in good faith believed plaintiff to be engaged in conduct which was inappropriate in the work place.*

Id. at 640-41 (emphases added).

Similarly, in *Mughal v. Chart House, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 626, 629 (N.D. Ill. 1986), the trial court upheld the employer's decision to terminate

the plaintiff's employment for suspected sexual harassment after the employer interviewed and obtained written statements from nine employees about the plaintiff's actions. Even though the court found that the investigation did not conform to the employer's own guidelines for sexual harassment investigations, the court held that the defendant's subsequent discharge of the plaintiff was not wrongful. *Id.*

The court below imposed an unfair burden on Pennzoil by allowing the jury to second-guess the actions that Pennzoil took in response to its good faith belief that sexual harassment and sex-based favoritism had occurred. As in the above cases, Pennzoil's good faith belief in the truth of the allegations of sexual harassment should insulate it from liability to Mr. Kestenbaum under state law unless Mr. Kestenbaum could show malice, bad faith, or a patently unreasonable investigation.

IV.

Title II

The opinion and judgment of the New Mexico Supreme Court incorrectly interpreted federal law by erroneously requiring that Pennzoil prove that it conducted an objectively reasonable investigation. The burden of demonstrating that it conducted a reasonable investigation of sexual harassment allegations is imposed on an employer when a victim of sexual harassment sues the employer under Title VII. *See Henson v. City of Dundee,* 682 F.2d 897, 905 (11th Cir. 1982). Such a burden should be inapplicable in a case in which a supervisor accused of sexual harassment sues the employer for discharging him. In the latter case, the employer is privileged to act upon a good faith belief that the supervisor was engaged in sexual

harassment. *See French v. Mead Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 635, 639-41 (S.D. Ohio 1983) (holding that the trial court could substitute its opinion for that of employer who terminated employment of alleged harasser only if employer acted in bad faith), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985); *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 388 (5th Cir. 1987) (holding that employer sued for defamation by supervisor terminated for sexual harassment had a qualified privilege to issue allegedly defamatory management statement to other employees, in part because the employer believed that it had a legal duty under Title VII to do so). This standard is required to promote the strong federal policy of eliminating sexual harassment by encouraging employer action in favor of the victim of sexual harassment so that in close cases the employer will take actions to vindicate the victim's federal rights.

Even if, arguendo, the New Mexico court correctly concluded that the investigation conducted by Pennzoil had to meet an objective standard of reasonableness, that court misapplied applicable federal law and erred in failing to correctly instruct the jury that the thorough investigation conducted by Pennzoil was reasonable as a matter of federal law.

The few Title VII cases to address this issue have found investigations far less extensive than the one conducted by Pennzoil in this case to be adequate. In a recent constructive discharge case brought by two female employees who claimed they had been sexually harassed by a managerial employee, the Eleventh Circuit found adequate an investigation into the sexual harassment allegations that was much less thorough than the in-

vestigation Pennzoil conducted. *Steele v. Offshore Ship Building, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). In *Steele*, a single representative of the employer interviewed only the two female complainants. In contrast, Pennzoil caused its Equal Opportunity and Affirmative Action Coordinator and a Senior Security Representative to interview twenty-six current and former employees in response to the accusations of sexual harassment involving Mr. Kestenbaum.

Similarly, in *Barrett v. Omaha Nat'l Bank*, the Eighth Circuit denied the plaintiff's claims of constructive discharge because of sexual harassment in light of an investigation by her employer that consisted only of interviews with the complainant, the two accused sexual harassers, and two other employees who were possible witnesses to the harassment. 726 F.2d 424, 427 (8th Cir. 1984).

In *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987), the court affirmed the district court's conclusion that the investigation undertaken by the employer was reasonable. In *Swentek*, the employer, after receiving an employee's complaint, forwarded the complaint to the appropriate supervisor who merely confronted the accused supervisor with the charges and credited his denials. *Id.* at 558. The court stated as follows:

> In taking remedial action, USAIR was obliged to investigate Swentek's charges and to present a reasonable basis for its subsequent actions. It was not, however, required to credit all of Swentek's allegations in order to escape liability.

Id. Subsequently, the court dismissed the employee's claims of sexual harassment. *Id.* at 563.

In *Stockley v. AT&T Information Systems, Inc.*, 687 F. Supp. 764 (E.D.N.Y. 1988), an extensive investigation very similar to the one undertaken by Pennzoil was deemed wholly adequate by the court. An executive in the employer's personnel office received an anonymous letter stating that sexual harassment existed in a particular office. The executive investigated all claims in the letter and interviewed more than twenty employees. Several employees implicated the plaintiff as having participated in sexual harassment, and the investigator subsequently interviewed the plaintiff. The plaintiff was disciplined as a result of the investigation and sued the employer for defaming him during the course of the investigation. *Id.* at 765-67. In granting the employer's motion for summary judgment on the plaintiff's claim that the employer had defamed him, the court stated that "the facts available to [the employer] plainly triggered its obligations under Title VII. The anonymous letter, while not terribly specific and not primarily aimed at [the plaintiff], did provide reasonable grounds for beginning an investigation. . . ." *Id.* at 769. The court also upheld the employer's disciplining of the plaintiff, stating that an employer's duty to act is compelled

> by the strong federal policy favoring vigorous enforcement of federal civil rights statutes. As the EEOC argued to this Court, private compliance and enforcement procedures are essential to the success of EEOC's efforts to eliminate employment discrimination.

Id.

Similarly, in *Wendorf v. Metropolitan Life Ins. Co.*, 47 Empl. Prac. Dec. (CCH) ¶ 38,316 (E.D.N.Y. 1988),

the court found that the employer's investigation, which consisted of the employer's regional sales manager merely talking to the employees in the office, drafting one memo to the file, and asking one employee to provide a written memo, constituted a sufficient investigation. *Id.* at 53,796. The court concluded that this investigation was "adequate even if there was substance to [the plaintiff's] charges," *id.*, and dismissed the plaintiff's constructive discharge claim.

As Judge Lynch reasoned in the 1987 case of *College-Town, Div. of Interco., Inc. v. Massachusetts Comm'n Against Discrimniation,*

> An employer should not have liability imposed on it for failing to conduct an investigation that would have been more in accordance with a lawyer's understanding of due process but which would have disclosed no additional facts and which could not have been expected to produce any different remedial action.

400 Mass. 156, 174, 508 N.E.2d 587, 597 (Mass. 1987) (Lynch, J., dissenting).

In none of these cases, nor in any other case that Pennzoil has been able to locate, has a court even hinted that an employer must satisfy any particular objective standard, much less utilize professional investigative techniques, in investigating allegations of sexual harassment in the workplace. The investigation undertaken by Pennzoil in this case was far more extensive than any undertaken in the above cases and went well beyond the resources of many employers subject to Title VII. It was adequate under the circumstances and in light of Pennzoil's obligation under Title VII. This Court should

grant Pennzoil's Petition for Writ of Certiorari and reverse the judgment of the New Mexico Supreme Court because that court incorrectly imposed a greater standard of an adequate investigation on Pennzoil than is imposed by Title VII.

V.

Federal Public Policy

The New Mexico court's decision is contrary to federal public policy because it affirmed Pennzoil's liability on an implied contract between Pennzoil and Mr. Kestenbaum that is inconsistent with Pennzoil's obligations under federal law. The New Mexico court held, in effect, that Pennzoil was contractually obligated not to terminate Kestenbaum even if it in good faith determined that he was engaged in sexual harassment. This Court has long recognized and applied the fundamental principle that private parties cannot agree or contract to violate the federal laws, and that any such contract is unenforceable. *United States v. Mississippi Valley Co.*, 364 U.S. 520, 563-66 (1961)(contract in violation of federal conflict of interest statute unenforceable).

The practical effect of the judgment below is that Pennzoil was held to have breached a contract by taking action that was required or protected by federal law. Federal law would clearly prohibit the express making of such a contract. Hence, any such contract, either express or implied, is invalid as a matter of federal public policy.

Even if the contract found by the jury and affirmed by the New Mexico Supreme Court was not *per se* illegal under federal law, it is clear that it was against the strong

federal public policy of ending sex discrimination in the workplace. As such, it is unenforceable under federal law and cannot form the basis for judicial relief. *See McBrearty v. United States Taxpayers Union,* 668 F.2d 450, 450-51 (8th Cir. 1982)(contract to pay family and defense expenses in the event tax protester incarcerated unenforceable because it contravened public policy). The court below has improperly affirmed the enforcement of a contract which violates federal public policy.

VI.

Proposed Rule of Law

Pennzoil is not asking this Court to hold that a supervisor discharged for sexual harassment may never sue his former employer for wrongful discharge or breach of contract. Pennzoil submits, however, that a qualified privilege, similar to the one applied by this Court in the defamation area, should protect an employer unless the discharged supervisor can show something akin to actual malice; i.e., that the employer knew that the charges of sexual harassment were false or that the employer was reckless concerning the truth or falsity of the allegations. In the absence of such a privilege and under instructions such as those of the New Mexico trial court, the employer's only defense is that the allegations of sexual harassment were in fact true. The practical reality of sexual harassment cases, however, is that an employer can seldom be certain that its decision is correct, but must nevertheless make credibility determinations and act promptly on incomplete information in an emotion-charged atmosphere. Omniscience in such a situation is simply not possible.

Pennzoil, therefore, proposes that this Court apply a test to such situations similar to the one used by the Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Specifically, once the plaintiff has proven, by a preponderance of the evidence, a prima facie case of discrimination, the burden then shifts to the defendant to show that it based the employment decision on a legitimate, nondiscriminatory reason. *Burdine*, 450 U.S. at 252-54. Once the defendant meets this burden, the plaintiff then has the burden of persuasion and must show that the reason proffered by the defendant was not the actual reason for the employment decision. *Id.* at 256.

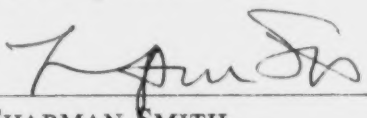
According to the *Burdine* test, once Mr. Kestenbaum and Pennzoil met their initial burdens of proof, Mr. Kestenbaum had the burden of persuading the trial court that Mr. Rundle's decision to terminate Mr. Kestenbaum's employment resulted from something other than Mr. Rundle's good faith belief that Mr. Kestenbaum had sexually harassed several female employees of Vermejo Park. Mr. Kestenbaum's failure to have the trial court rule on the issue of whether he met this burden of persuasion results in a failure to fulfill the requirements this Court established in *Burdine* and *McDonnell Douglas*. Thus, Mr. Kestenbaum's cause of action must fail.

CONCLUSION

For the above reasons, this Petition for Certiorari to the Supreme Court of the State of New Mexico should be granted, and this Court should issue a final decision resolving the burden of employers who, in complying

with federal law outlawing sexual harassment and sex-based favoritism, are subjected to substantial liability by a state tribunal as a result of such compliance.

Respectfully submitted,



L. CHAPMAN SMITH
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1546

Counsel of Record
for Petitioners

Of Counsel:

BAKER & BOTTS
PAUL L. MITCHELL
MARIA L. WYCKOFF
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

RON D. DAUGHERTY
P. O. Box 2967
Houston, Texas 77252-2967
(713) 546-8825

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 16,965

LOUIS KESTENBAUM,
Plaintiff-Appellee and Cross-Appellant.

v.

PENNZOIL COMPANY and
VERMEJO PARK CORPORATION,
Defendants-Appellants and Cross-Appellees.

Appeal From The District Court of Colfax County
Leon Karelitz, District Judge

(Filed November 30, 1988)

Hinkle, Cox, Eaton, Coffield & Hensley
Harold L. Hensley, Jr.
Stuart D. Shanor
James M. Hudson
Roswell, NM

Ron D. Daugherty
Houston, TX
for Appellant

Chris Key
Albuquerque, NM
Kacey DeNoi
Albuquerque, NM
for Appellee

Mountain States Legal Foundation
Constance E. Brooks
Paul Farley
Denver, CO

Losee & Carson
Jerry Losee
Artesia, NM
Amicus Curiae

OPINION

RANSOM, Justice.

Plaintiff Louis Kestenbaum was awarded damages for breach of an employment contract. The trial was had before a jury which found by special verdict that the employment was not terminable at will, but rather was subject to an implied contract requiring a good reason for termination, and that there was no good reason to discharge Kestenbaum. We affirm.

Kestenbaum was employed in March of 1977 by defendants Pennzoil Company and its subsidiary, Vermejo Park Corporation; as the vice president in charge of guest operations at a secluded ranch in northern New Mexico. The ranch maintains guest facilities and services for lodging, hunting, fishing, and other recreational activities.

By anonymous letter in January of 1984, Kestenbaum was accused of sexual harassment, illegal conduct, and mismanagement of the ranch. Pennzoil initiated an investigation in which information was gathered through interviews of Vermejo Park female employees, past and present. Subsequently, the investigators presented to Pennzoil officials an oral briefing and a written report that summarized the evidence. On February 13, 1984, Pennzoil summoned Kestenbaum to its headquarters in Houston where he met with the investigators who confronted him with the allegations concerning sexual harassment, which he denied. Thereafter, Pennzoil officials informed Kestenbaum of the names of the persons interviewed and he was given the opportunity to comment about each. Pennzoil also permitted Kestenbaum to name witnesses who would speak on his behalf. Kestenbaum met one more time with Pennzoil vice-president Rundle

and again denied the allegations, but to no avail. On February 17, Kestenbaum's employment was terminated.

Kestenbaum claimed that, without fair investigation and consideration of the allegations and his response, he was terminated on the grounds of sexual harassment for which he was innocent. Pennzoil denied Kestenbaum's claim and affirmatively asserted that Kestenbaum was an employee at will and was dischargeable for any or no reason. Alternatively, if a good reason was required to discharge Kestenbaum, Pennzoil asserted that it had reasonable grounds to believe that sufficient cause existed to justify its actions.

By Instruction No. 8, the jury was instructed on Kestenbaum's claim that, by words and conduct, the parties entered into an employment contract which included among its terms that (1) in addition to a salary for Kestenbaum's labor and best job efforts, he would receive various fringe benefits, including but not limited to a retirement program, a stock purchase program, and health and other insurance; (2) the employment would be of a long-term nature, but subject to the normal contingencies of work life, such as a sale of the ranch, early voluntary retirement, layoffs and so on; and (3) with regard to involuntary termination of employment, Kestenbaum would be terminated only for just cause or, in other words, for a good reason, he would be treated fairly, have the opportunity to know some specifics of the charges against him, be given a chance to defend himself, and his supervisors would not determine whether there was just cause for the termination until hearing and fairly considering Kestenbaum's side of the story. Whether these claimed terms and conditions applied to the em-

ployment contract was left for the jury to determine on disputed evidence.

Without objection, the court instructed the jury on the applicable law of employment contracts, as follows:

INSTRUCTION No. 9

An implied contract is an agreement in which the parties, by a course of conduct, have shown an intention to be bound by such agreement.

INSTRUCTION No. 10

Under New Mexico law, the general rule is that a contract for permanent employment, calling only for the performance of duties and payment of wages, is a contract for an indefinite period. It is terminable at the will of either party. A discharge without reason is not a breach of such an at will employment.

INSTRUCTION No. 11

In every contract the law implies a covenant of good faith and fair dealing between the parties . . .

The implied covenant of good faith and fair dealing, however, is not to be used by you in determining whether or not there was a term of an implied contract calling for discharge for just cause only. You must first find from the words and conduct of the parties that they intended that the plaintiff's discharge would be made for just cause only.

If you find that there was an implied contract of employment between the parties which included a good-reason standard for termination, then the implied covenant of good faith and fair dealing requires in the traditional sense a moral quality equated with honesty of purpose, freedom from fraudulent intent and faithfulness to duty or obligation.

The jury also was instructed that, for purposes of guidance, it could properly resort to Equal Employment Opportunity Commission guidelines that define what constitutes sexual harassment under the "totality of the circumstances" rule. The guidelines describe the strict responsibility of an employer for the acts of its supervisory employees with respect to sexual harassment and state that an employer should develop appropriate sanctions and take all steps necessary to prevent sexual harassment. The court further instructed the jury that sexual harassment by a supervisor is a violation of law and that, where an employer receives allegations of conduct that could amount to sexual harassment, the employer has a legal duty and obligation to investigate and promptly take appropriate remedial action. Finally, the court instructed that evidence in a case involving sexual harassment is typically contradictory. Nonetheless, the employer still has the duty to take action to prevent sexual harassment.

We address the following issues raised by Pennzoil in this appeal: (1) Whether the claim for breach of an implied employment contract was barred by the statute of frauds? (2) Whether there was substantial evidence to support the jury's finding of an implied employment contract requiring a good reason for termination? (3) Whether the law applied by the court unduly restricted Pennzoil's showing that there was a good reason for the discharge? (4) In terminating employment for good reason, what is the standard for judging the conduct of the employer? (5) Whether the court committed reversible error in refusing to instruct specifically on asserted defense theories as requested by Pennzoil? (6) Whether Pennzoil was entitled to a new trial by reason of inflammatory closing arguments, by reason of the receipt of

evidence germane to claims dismissed on directed verdicts, but irrelevant and immaterial to the claims finally submitted, or by reason of a verdict contrary to the weight of the evidence?

Statute of Frauds. Pennzoil contends that the trial court erred in denying its motion for directed verdict on the breach of contract claim. Pennzoil asserts that, because the action was based on an oral employment contract that could not be performed within one year, the action was barred by the statute of frauds. *See Skarda v. Skarda,* 87 N.M. 497, 501, 536 P.2d 257, 261 (1975). At the least, Pennzoil argues, the court erred in keeping the issue from the jury. Pennzoil maintains that an agreement for employment until Kestenbaum's retirement would have been for a specific term more than one year, rather than for life or for an indefinite period. Pennzoil concedes that the statute of frauds does not apply to a contract under the latter circumstances. *See Hodge v. Evans Fin. Corp.,* 823 F.2d 559, 561-65 (D.C. Cir. 1987). Nor does it apply to a contract for employment until retirement.

> There is no indication in local law or elsewhere that a permanent employment contract should be construed as a contract for an expressly stated, fixed term of years by virtue of an employee's expectation that he or she will retire at some point. No court or commentator has ever suggested that the possibility of the employee's death within one year would "defeat" rather than "complete" such a contract. To the contrary, courts and commentators have consistently accepted the view that indefinite permanent employment contracts such as Hodge's fall outside the statute because they are capable of full performance within one year. *See, e.g.,* 2 *Corbin on Con-*

> *tracts* § 446, at 549-50 (Permanent employment contracts fall outside the statute because "[t]he word 'permanent' has, in this connection, no more extended meaning than 'for life.' "); 3 *Williston on Contracts* § 495, at 582 ("A promise of permanent personal performance is on a fair interpretation a promise of performance for life, and therefore not within the Statute.").

823 F.2d at 564 (footnote omitted). As with Hodge, Kestenbaum unequivocably alleged a contract for permanent employment, not a contract until he reached a specified age of retirement.

Further, Pennzoil bore the burden of pleading and proving the affirmative defense of the statute of frauds. *See* SCRA 1986, 1-008(C). As a general rule, determination of the applicability of the defense of the statute of frauds is a question of law for the court, not the jury. *Sanchez v. Martinez,* 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982). However, a factual question concerning the particulars of a contract may prevent a ruling on the statute's applicability as a matter of law. *Sierra Blanca Sales Co. v. Newco Indus., Inc.,* 84 N.M. 524, 505 P.2d 867 (Ct. App.), *cert. denied,* 84 N.M. 512, 505 P.2d 855 (1972). That is not the case here. Pennzoil presented no affirmative evidence on the issue, and Kestenbaum's evidence established that his employment contract was indefinite in duration.

Substantial Evidence to Support Jury Finding of Implied Employment Contract Allowing Discharge Only For Good Reason. Seeking support in *Gonzales v. United Southwest Nat'l Bank,* 93 N.M. 522, 602 P.2d 619 (1979), and *Garza v. United Child Care, Inc.,* 88 N.M. 30, 536 P.2d 1086 (Ct. App. 1975), Pennzoil argues

that, because Kestenbaum's oral employment agreement was for an indefinite period, he was an employee at will, dischargeable for any or no reason. Although Pennzoil recognizes an exception to at-will employment exists for an implied contract term based on the words and conduct of the parties, it maintains that, in New Mexico, this exception has been based only upon provisions included in an employee handbook or personnel manual. *See Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980); *Francis v. Memorial Gen. Hosp.*, 104 N.M. 698, 726 P.2d 852 (1986). Even where a policy manual exists it will not always change the at-will employment relationship if the manual is not sufficiently specific. *Sanchez v. The New Mexican*, 106 N.M. 76, 738 P.2d 1321 (1987); *cf. Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 748 P.2d 507 (1988) (where handbook represented an established policy regarding terminations and failed to alert employees against placing reliance upon it, policy properly could be found part of employment agreement).

Several jurisdictions quite properly have been willing to impose implied contractual duties based upon particular representations or conduct of an employer, without limitations to handbooks or manuals. These courts recognize that oral statements made by an employer may be sufficient to create an implied contract which provides that an employee shall not be discharged except for cause. We agree. *See e.g., Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925-26 (1981) ("In determining whether there exists an implied-in-fact promise . . . courts have considered . . . personnel policies or practices of the employer . . . [and] actions or communications by the employer

reflecting assurances of continued employment. . . ." (footnotes omitted)). Other courts that have restricted the right to freely discharge at-will employees because of an employment policy or procedure recognize the traditional at-will rule to be a rebuttable presumption. *See, e.g., Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458 466, 443 N.E.2d 441, 446, 457 N.Y.S.2d 193, 198 (1982) (at-will rule affords no greater status than that of a rebuttable presumption and trier of fact should consider course of conduct of the parties, including the writings and antecedent negotiations); *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984) (en banc).

In the consolidated cases of *Toussaint and Ebling,* two employees, one employed for five years and the other for two years, brought wrongful discharge actions against their respective former employers. Toussaint received an oral assurance that "he would be with the company 'as long as I did my job,' " and Ebling "was told that if he was 'doing the job' he would not be discharged." Each employee asserted that the statements made by the employer constituted an agreement not to discharge except for good cause. 408 Mich. at 597, 292 N.W.2d at 884. The employers argued, as does Pennzoil, that employment contracts for an indefinite term are terminable at the will of either party unless the employee has furnished consideration independent of his services to his employer.

Toussaint's case was strengthened because upon being hired he was handed a personnel manual that reinforced the oral assurance of job security. The court, however, did not rest its decision on the presence of the personnel manual. It ruled that (1) a provision of an employment contract providing that an employee shall not be dis-

charged except for cause is legally enforceable although the contract is not for a definite term, and (2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements. The court further held that "[e]mployers are most assuredly free to enter into employment contracts terminable at will without assigning cause. We hold only that an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract." 408 Mich. at 610, 292 N.W.2d at 890. The court concluded that when a prospective employee inquires about job security and the employer agrees that the employee shall be employed so long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will and may discharge only for "good or just cause." *Id.*

Pennzoil claims that the evidence presented by Kestenbaum was insufficient as a matter of law to establish an implied contract that required a good reason to terminate the employment relationship. We believe, however, that the evidence was sufficient to overcome the presumption that the employment contract was terminable at will. There was substantial evidence from which a jury reasonably could find that the parties agreed to a contract that permitted termination only for a good reason.

Kestenbaum presented the following evidence to establish that his employment contract was for an indefinite period of time, and allowed involuntary removal only for a good reason. During initial employment negotiations, Kestenbaum's immediate supervisor at Vermejo Park made clear that the employment would be long

term and permanent as long as Kestenbaum did his job. This was uncontroverted. Further, Kestenbaum testified that those assurances were consistent with his needs for long-term job security and the fact that he would not have considered the job if offered only on a short-term basis.

Mr. Wolfe, former operations manager at Vermejo Park, testified that Pennzoil only released permanent employees for "a good reason, a just cause." Mr. Lew, an investigator, stated that he presumed that Pennzoil only terminated employees for just cause. Vice-president Rundle confirmed this policy, as did Mr. Charlesworth, Kestenbaum's successor supervisor, who testified that Pennzoil believed it had to "have a good reason to terminate an employee" and that the Houston office always required good cause. Pennzoil presented no evidence that it maintained a "fire-at-will" management practice.

The insurance benefits manual and the policy manual also provided additional evidence regarding Pennzoil's policy and practice to forego its common-law right to fire at will. The insurance benefits manual contained a provision describing conversion privileges after termination of employment. The manual made no mention of a termination without cause. Neither did the severance pay plan in the policy manual address the effect of a without-cause termination of employment.

Pennzoil attempts to refute the sufficiency of the evidence by attacking each element individually. First, Pennzoil maintains that an implied employment contract altering the at-will presumption cannot be premised upon Kestenbaum's subjective understanding about statements made at the inception of the employment relationship.

See Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc). Pennzoil further asserts that the insurance benefits policy and severance pay plan are insufficient to create an implied contract because neither specifically altered the at-will relationship. Finally, Pennzoil contends that management practice has never been recognized in New Mexico as a sufficient basis from which to imply an employment contract allowing discharge for cause only.

We are unwilling to test the sufficiency of each piece of evidence standing on its own in a vacuum and rule, as a matter of law, that each alone fails to support a finding of an implied employment contract. In overcoming the presumption, it is not any single act, phrase or expression, but the totality of all of these, given the circumstances and the parties' situation and objectives, which will control. *Weiner*, 57 N.Y.2d at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198; *Pugh*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927 ("While oblique language will not, standing alone, be sufficient to establish agreement . . . it is appropriate to consider the totality of the parties' relationship. . . ." (citation omitted)). Undoubtedly, under *Sanchez v. The New Mexican*, the policy statements addressing insurance benefits and severance pay would, without more, be inadequate to alter the at-will relationship. However, when coupled with uncontroverted testimony describing the negotiations between Kestenbaum and Pennzoil's agent and with Pennzoil's concession that there was a management practice followed by Pennzoil not to terminate employment except for a good reason, there is substantial evidence to support the jury finding that an implied employment provision for discharge only for a good reason was in effect between Pennzoil and Kestenbaum.

Law Applied as to Good Reason for Discharge. Pennzoil argues that good reason for discharge existed as a matter of law and contends that the jury was misinstructed on applicable rules of implied contract. In reviewing alleged errors relating to jury instructions, this Court will consider whether all of the instructions, when read and considered together, fairly present the issues and the law applicable thereto. *Webb v. Webb*, 87 N.M. 353, 533 P.2d 586 (1975). We recognize that the Uniform Jury Instructions contemplate that instructions should be concise and should not comment on the evidence. *See* SCRA 1986, Judicial Pamp. 13—The Concept of Jury Instructions; *Kinney v. Luther*, 97 N.M. 475, 641 P.2d 506 (1982).

The first instruction we address that was objected to by Pennzoil is Instruction No. 12, which read as follows:

INSTRUCTION NO. 12

> Where the terms of an implied contract of employment between the parties include provision for the employer to give the employee a chance to defend himself and to have some specifics of the charge, then you are instructed that the reasons given by the employer at the time of termination are the only reasons that the defendants may rely upon to show there was a good reason for the plaintiff's discharge.

Pennzoil objected to and appeals from the court's refusal to instruct to the contrary that, in an action for wrongful discharge, the employer may claim in defense any sufficient cause for terminating the employment. Pennzoil's requested instruction was based upon the law in *Kiker v. Bank Sav. Life Ins. Co.*, 37 N.M. 346, 23 P.2d 366 (1933), and provided that, "in an action for

wrongful discharge, the employer may claim in defense any sufficient cause for terminating the employment, (i) even if it may have been unknown to him at the time of termination, (ii) even if his real reason or motive may have been something else, or (iii) even if another reason was expreslly [sic] given." However, the language quoted from *Kiker* does not purport to apply to the circumstances of this case. Here, if the jury were to find that the employment contract required Pennzoil to given Kestenbaum notice of specifics of the charge, and a chance for him to defend, indeed, the reasons given by Pennzoil to Kestenbaum are the only reasons that it could rely upon. Where parties stipulate that the employer will terminate by notice specifying cause, "a discharge specifying no cause, or an insufficient cause, would be wrongful. It follows that, under such a contract, a cause not specified would not be available in defense." *Id.* at 349, 23 P.2d at 368. In the present case, no issue was raised contesting the right to notice and a hearing if the employment were not found to be at will. The trial court was correct to refuse Pennzoil's requested instruction.

Pennzoil's next contention is that the court erred in refusing its requested instruction that any finding of illegal conduct on the part of an employee is good cause for discharge. Pennzoil maintains that its requested instruction was necessary to inform the jury of the possible consequences of Kestenbaum's alleged illegal conduct in connection with the service and consumption of alcoholic beverages by minors. The record indicates that the requested instruction was a proper subject for argument but a misstatement of the law as applied to these facts. Pennzoil presented evidence at trial that Kestenbaum permitted minors to serve and to consume alcohol. Evidence

also was presented that this practice existed prior to Kestenbaum's management of Vermejo Park and continued after his termination. Moreover, Kestenbaum's superiors were aware that under-age waitresses served alcohol to the guests, and expressed no concern. Given this evidence, the jury could have found that Kestenbaum's conduct was in the furtherance of the interests of the corporation and authorized by corporate superiors. The trial court properly concluded that the jury could in one context find that illegal conduct in performance of the job is good reason for firing, and in another context find it is not. It would have been error for the court to compel the jury to find that, under these circumstances, this conduct represented a good reason for discharge.

Standard for Judging Conduct of Employer in Terminating Employment for a Good Reason. Pennzoil objected to and appeals from the court's refusal to instruct that, where an employee is terminated for a good reason, the employer does not have to prove that the reason in fact existed. Pennzoil argues that the employer need only in good faith believe that the employee engaged in conduct that was inappropriate in the work place. *See Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982) (en banc) (absent evidence of express or implied agreement whereby employer contracted away its fact-finding prerogative, in discharge for good cause, there need only be substantial evidence to support employer's decision and that employer believed evidence and acted in good faith). Pennzoil contends that its requested Instruction No. 15 was essential to inform the jury of the employer's position at the time of Kestenbaum's discharge. Unless a jury is instructed that an employer only is required to demonstrate a good faith belief that cause

existed to terminate, Pennzoil seems to suggest that the only alternative is to instruct the jury that the employer must prove good cause in fact.

Pennzoil maintains that to require an employer to have a preponderance of evidence establishing good cause in fact prior to making a decision to terminate an employee would place an unrealistic burden on the employer. Pennzoil points out that an employer does not have the benefit of extended discovery but must base his decision on information available at the time of discharge.

We agree, but we do not perceive the issue in the bipolar manner fashioned by Pennzoil. We believe that a middle position exists under these circumstances, and, further, that the jury properly was instructed on this middle position. The issue upon which the jury was instructed was whether Pennzoil "had reasonable grounds to believe that sufficient cause existed to justify the defendants' actions in discharging the plaintiff." Accordingly, the jury could have absolved Pennzoil of liability under its implied contract with Kestenbaum provided that Pennzoil had reasonable grounds to believe that sufficient cause existed to justify his termination. *See Crimm v. Missouri Pac. R.R.*, 750 F.2d 703, 713 (8th Cir. 1984) (under Title VII, employer need not prove that employee committed sexual harassment, employer only needs a reasonable belief that sexual harassment occurred). The trial court correctly denied Pennzoil's requested Instruction No. 15 because it erroneously suggested the jury could find good cause from the employer's subjective good faith belief as opposed to an objective standard of reasonable belief.

Furthermore, there was substantial evidence to support the jury finding that Pennzoil did not act upon reason-

able grounds. In her deposition, Pennzoil's investigator admitted on cross-examination that her summary was not intended to stand alone, that it failed to differentiate between first-hand knowledge, attributed hearsay, or mere gossip or rumor, and no attempt was made to evaluate the credibility of the persons interviewed. Nevertheless, the only document reviewed by vice-president Rundle before he fired Kestenbaum was his investigator's summary of interviews. Moreover, he did not take a close look at the way the investigation had been handled, but relied upon the professionalism of his investigators. At trial, Kestenbaum presented an expert who testified that Pennzoil's investigators did not observe the standards of good investigative practice and who identified numerous deficiencies in the investigation.

Pennzoil claims further that the court erred in refusing to instruct the jury on "wide latitude" and "great scope" as standards for judging an employer's conduct when dealing with managerial employees. Pennzoil asserts Instruction No. 12 severely limited the potential conduct of the employer. Pennzoil argues that an instruction on "wide latitude" and "great scope," like Pennzoil's requested instruction concerning good faith belief, was necessary to inform the jury of the employer's position when determining the existence of good cause. We hold, however, that the trial court properly exercised its discretion in refusing the instruction because it did not supply any needed guidance to the jury. The requested instruction was properly the subject of argument for counsel. *See* SCRA 1986, 1-051

Refusal to Instruct on Asserted Defense Theories as Requested by Pennzoil. Pennzoil challenges the court's

refusal of its requested Instruction No. 100, or alternatively, No. 101, and claims the court erred in giving Instruction No. 8 instead. Pennzoil maintains that Instruction No. 8 was prejudicial in that it allegedly permitted Kestenbaum to present a statement of his case, while denying Pennzoil the opportunity to state its theory of the case. Instruction No. 8 explained the burdens of proof and the contentions of the parties in conformity with SCRA 1986, 13-302B. The portion of Pennzoil's requested instructions excluded from Instruction No. 8 were statements asserting that (1) the defendants had an obligation to investigate the charges of sexual harassment and to take appropriate and remedial action, (2) the investigation by Pennzoil was more thorough and was conducted by more experienced investigators than is normal in a personnel investigation, (3) the investigation revealed conduct inappropriate for the workplace which would constitute sexual harassment, and (4) Pennzoil's presentation of the charges against Kestenbaum were in sufficient detail so that he could understand them and he was given adequate opportunity to defend himself. We agree with the trial court that these statements simply constituted denials of the claims articulated by Kestenbaum. The trial court acted within its discretion in ruling that the statement, "[t]he defendants deny the contentions of the plaintiff", was sufficient and it was unnecessary to incorporate Pennzoil's requested instructions into the format of SCRA 1986, 13-302C. It is not error to deny requested instructions where the court gave instructions that adequately covered the issue. *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969). Early in this opinion we discussed the detailed instruction by which the jury was guided on the employer's required response to charges of sexual harassment.

The record indicates that Pennzoil had ample opportunity to express its affirmative theories which were clearly stated in Instruction No. 8. We hold, therefore, that the instructions as given did not deprive Pennzoil of an opportunity to fairly state its theory of the case. Based upon our review of the instructions as a whole, we find that no prejudice resulted to Pennzoil.

Refusal to Grant Pennzoil's Motion for New Trial. The granting of a new trial is discretionary with the trial court. *State ex rel. State Highway Dep't v. Robinson*, 84 N.M. 628, 506 P.2d 785 (1973). Refusal to grant a new trial will only be reversed where it is found to be an abuse of discretion. *Id.*

Pennzoil first claims that several remarks during Kestenbaum's closing argument were inflammatory, misleading, and prejudicial. Specifically, Pennzoil refers to remarks made that referred to (1) Pennzoil's relation to the local community, (2) the court's grant of Pennzoil's motion for directed verdict on only six of the eight claims brought by Kestenbaum, and (3) the non-appearance of some of Pennzoil's witnesses. During Kestenbaum's closing, Pennzoil failed to raise any objection. "[A]ny objections to the argument of counsel should be made in time for the court to rule on them, and, if necessary, to correct them before the jury retires. . . ." *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 474, 349 P.2d 1029, 1039 (1960). This Court has recognized that in the proper case improper remarks made by counsel could necessitate reversal and award of a new trial, notwithstanding a failure to object. *Griego v. Conwell*, 54 N.M. 287, 222 P.2d 606 (1950). Pennzoil, however, had the burden to demonstrate to the trial court that its rights were prejudiced because the argument was improper and be-

cause the remarks were "reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case." *Apodaca v. United States Fidelity and Guar. Co.*, 78 N.M. 501, 502, 433 P.2d 86, 87 (1967) (quoting *Aultman v. Dallas Ry. & Terminal Co.*, 152 Tex. 509, 516, 260 S.W.2d 596, 600 (1953)). It was within the sound discretion of the trial court to conclude that Pennzoil failed to meet its requisite burden. In its order denying Pennzoil's motion for a new trial, the court opined that had Pennzoil timely objected a curative instruction could have been conveyed to the jury. Our review of Kestenbaum's closing argument supports the reasonableness of the trial court's conclusion that any alleged prejudicial effect of the improper remarks could have been cured by proper instruction. *See Jackson*, 66 N.M. at 474, 349 P.2d at 1039 (any objections to counsel's argument should be timely made, unless they are of such serious nature that a cautionary instruction would not cure the error).

Pennzoil also complains that relevant evidence admitted at trial caused prejudice to its case, in light of the fact that the court ultimately granted Pennzoil's motion for directed verdict on these issues. Pennzoil contends that, because evidence subsequently rendered irrelevant infected the record, it was deprived of a fair trial and, therefore, was entitled to a new one. Pennzoil relies upon (1) testimony regarding Pennzoil's subsequent treatment of certain Vermejo Park employees who were deposed by Kestenbaum and provided testimony unfavorable to Pennzoil's interest and (2) evidence regarding the value of land donated to the United States by Pennzoil and witness testimony which opined that the valuations were excessive and adverse to taxpayers' interests. The tran-

script references cited by Pennzoil fail to demonstrate evidence sufficiently prejudicial to support a finding that the trial court abused its discretion. Nothing pointed out by Pennzoil convinces us that the trial court acted unreasonably in determining that Pennzoil received a fair trial and was not entitled to a new one. *See Paternoster v. La Cuesta Cabinets, Inc.*, 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984) (abuse of discretion occurs when action taken is arbitrary and capricious or in excess of the bounds of reason).

Pennzoil's remaining claim, that the verdict is contrary to the weight of the evidence, is without merit. We have demonstrated earlier in this opinion that substantial evidence existed to support the jury's decision. The trial court properly denied Pennzoil's motion for new trial. The appraisal of prejudice, if any, and the appraisal of the clear weight of the evidence are most appropriately left to the discretion of the court that observed the trial, heard the complaints and arguments of the movant, and, fortified with the necessary personal judgment and professional skills, passed upon the merits of the motion for a new trial.

Based upon the foregoing, the verdict of the jury and the judgment based thereon are affirmed.

IT IS SO ORDERED.

/s/ RICHARD E. RANSOM
Richard E. Ransom, Justice

WE CONCUR:

/s/ DAN SOSA, JR.,
Dan Sosa, Jr., Senior Justice

/s/ MARY C. WALTERS
Mary C. Walters, Justice

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Friday, January 13, 1989

NO. 16,965

LOUIS KESTENBAUM,
Plaintiff-Appellee
and Cross-Appellant,

v.

PENNZOIL COMPANY, et al.,
Defendants-Appellants
and Cross-Appellees.

This matter coming on for consideration by the Court upon Motion of Appellants for rehearing and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Appellants for rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ ROSE MARIE ALDERTE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

EIGHTH JUDICIAL DISTRICT
COUNTY OF COLFAX
STATE OF NEW MEXICO

NO. 85-94-CV

LOUIS KESTENBAUM,
Plaintiff,

v.

PENNZOIL CORPORATION, et al.,
Defendants.

(Filed December 4, 1986)

JUDGMENT

THIS MATTER having come on for jury trial on October 14, 1986, the Court having permitted the jury to return its verdict upon Count I, Breach of Implied Employment Contract, and Count VIII, Invasion of Privacy, the jury having considered the evidence, deliberated its verdict, and returning its verdict upon special interrogatories in open Court on November 14, 1986, the Court having accepted the verdict of the jury and being otherwise fully advised of the circumstances,

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall take nothing from the Defendants on Count VIII of the Complaint alleging invasion of privacy, and Judgment shall be entered for the Defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall have Judgment entered against the Defendants Vermejo Park Corporation and Pennzoil Corporation in the amount of Five Hundred Thousand Dollars ($500,000.00), together with the Plaintiff's costs incurred to be awarded by the Court, and post-judgment interest as provided by law.

/s/ JUDGE LEON KARELITZ
District Court Judge

Approved:

/s/ CHRIS KEY
Attorney for Plaintiff

/s/ HAROLD L. HENSLEY, JR.
Attorney for Defendants

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1834 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PENNZOIL COMPANY, and
VERMEJO PARK CORPORATION,
Petitioners,

v.

LOUIS KESTENBAUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

---

RESPONDENT'S BRIEF IN OPPOSITION

CHRIS KEY
(Counsel of Record)
211 Twelfth Street, N.W.
Albuquerque, N.M. 87102
(505) 242-9097

KACEY DENOI
160 Washington, S.E.
Albuquerque, N.M. 87108
(505) 226-8525

MICHAEL B. BROWDE
MARIO E. OCCHIALINO
1117 Stanford, N.E.
Albuquerque, N.M. 87106
(505) 277-5326
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27 pp

QUESTIONS PRESENTED

I. Whether the federal claims raised in the petition were brought to the attention of the state courts below "with fair precision and in due time" so as to confer jurisdiction on this Court under 28 U.S.C. § 1257?

II. Whether federal law mandates the firing of an employee with a contract of employment which permits his discharge "only for a good reason," where the employer had no reasonable basis to believe allegations that the employee is guilty of sexual harassment of fellow employees?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
I. The Federal Questions Presented in the Petition Were Not Brought to the Attention of the State Courts Below "With Fair Precision and in Due Time" So As to Confer Jurisdiction on This Court Under 28 U.S.C. § 1257	4
II. Even If the Federal Questions Had Been Properly Presented and Preserved Below, There Are No Compelling Reasons to Grant the Writ in This Case, Because Federal Law Does Not Mandate the Firing of an Employee Where the Employer Has No Reasonable Basis to Believe That the Employee Is Guilty of Sexual Harassment	8
CONCLUSION	13
APPENDICES	1a
Appendix A (Transcript of directed verdict argument)	1a
Appendix B (Transcript of jury instruction argument)	2a
Appendix C (Excerpts from Pennzoil's Brief-in-Chief below)	5a
Appendix D (Jury instructions 16, 17, and 18)	9a

TABLE OF AUTHORITIES

Cases: Page

Allen v. McCurry, 449 U.S. 90 (1980) 7
Beck v. Washington, 369 U.S. 541 (1962) 7
California Federal Savings & Loan Ass'n v. Guerra, 93 L. Ed. 2d 613 (1987) 9
Cardinale v. Louisiana, 394 U.S. 437 (1969) 7
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 7-8
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10
French v. Mead Corp., 33 Fair Empl. Prac. Cas. (BNA) 635 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985) 11
Frazier v. Colonial Williamsburg Foundation, 574 F. Supp. 318 (E.D. Va. 1983) 10
Hathorn v. Lovorn, 457 U.S. 255 (1982) 5
Illinois v. Gates, 462 U.S. 213 (1983) 7
Mughal v. Chart House, Inc., No. 85-5396 (N.D. Ill., Aug. 27, 1986) 11
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 7
Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970) 7, 8
Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982) 6
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 4-5
Schwartz v. Texas, 344 U.S. 199 (1952) 10
Simmerman v. Nebraska, 116 U.S. 54 (1885) 5
State v. Curlee, 98 N.M. 576, 651 P.2d 111 (Ct. App. 1982) 5

Statutes:

28 U.S.C. § 1257 ..... 4, 7, 8
42 U.S.C. § 2000e, *et seq.* 4, 9, 10

Regulations:

29 C.F.R. § 1604.11(d) 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1834

PENNZOIL COMPANY, and
VERMEJO PARK CORPORATION,
Petitioners,

v.

LOUIS KESTENBAUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Louis Kestenbaum, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the New Mexico Supreme Court's opinion in this case. That opinion is reported at —— N.M. ——, 766 P.2d 280 (1988), and is reprinted in full in Appendix A to the petition. (Pet. 1a-21a.)

STATEMENT OF THE CASE

Respondent, Louis Kestenbaum was awarded damages for breach of an employment contract with Pennzoil, under which he could be discharged "only for a good reason."[1] (Pet. 12a) Petitioners would have this Court be-

[1] Both during the trial and on appeal the thrust of Pennzoil's defense was two-fold: 1) that Kestenbaum was an employee at will, subject to termination without cause, and 2) if his contract required cause to dismiss him, that Pennzoil had sufficient grounds—found in the report of its staff who investigated the anonymous sexual harassment charges against Kestenbaum—to justify its belief that dismissal was warranted. (*See* Pet. 3a).

lieve that Mr. Kestenbaum was dismissed only after an "extensive" (Pet. 3) and "thorough" (Pet. 4) investigation into anonymous sexual harassment charges, which led Pennzoil to "correctly . . . believe[]" that his firing was required. (Pet. 15) Petitioners describe at some length the nature of that investigation, (Pet. 4-7), but leave out critical facts of record, a summary of which is set forth in the margin.[2] Indeed, many of these impor-

---

[2] Ms. McCormick, who led the investigation, had no actual field experience in investigation (McCormick Depo. at 74); she did not understand the need to uncover the bias of witnesses, and did not know the techniques to do so (*id.* at 98). She never considered that some of the informants might have a motive to give false information, and made no inquiry into people's motives (*id.* at 96); nor did she question any witnesses' powers of observation, or opportunity to observe (*see id.* at 183-86).

Neither Mr. Lew, (the other investigator), nor Ms. McCormick determined whether persons interviewed were reporting firsthand information or merely reporting complaints by others, (Tr. 308-09), and Ms. McCormick admitted that she did not distinguish between hearsay attributed to an identified person, information based on actual observation of the person interviewed, and mere rumor or gossip (*see* McCormick Depo. at 135-37, 141). The investigators devised no system to cross-check the information they were receiving because "[w]e were reviewing each employee independently and we were not sharing an employee's testimony with another employee . . ." (Tr. 531; McCormick Depo. at 99). Because they were only instructed to interview female employees (*see* Pennzoil Brief-in-Chief below at 4), they failed to follow up with interviews of males who they knew might provide corroborating or contradictory information on important points (McCormick Depo. at 151).

Mr. Lew avoided making any judgments about the relative importance of the information they were receiving (Tr. 321-22). Ms. McCormick reported all information, whether or not she believed the informant (McCormick Depo. at 101), although McCormick was of the mind that allegations were "substantiated" whenever they had information—either firsthand or secondhand—concerning that allegation (McCormick Depo. at 107). Furthermore, whenever they received positive comments about Mr. Kestenbaum, they merely noted that the person had no problems. They apparently asked no follow-up question to these positive comments,

tant facts of record were relied on by the Supreme Court of New Mexico, in support of its conclusion that "there was substantial evidence to support the jury finding that Pennzoil did not act upon reasonable grounds." (Pet. 16a-17a)

Pennzoil's claim on appeal was that it need not show that a "*reason in fact* existed" for Kestenbaum's dismissal, but only that it had "a *good faith belief* that cause existed to terminate." (Pet. 15a-16a) (Emphasis added.) The New Mexico Supreme Court rejected this "bipolar" approach, and concluded instead that the proper "middle position," was taken by the trial court in instructing the jury to consider whether Pennzoil "had *reasonable grounds to believe* that sufficient cause existed to justify [its] actions in discharging the plaintiff." (Pet. 16a, *quoting* Jury Instruction No. 8 as given). (Emphasis added.) Thus, the New Mexico Supreme Court also held that "[t]he trial court correctly denied Pennzoil's requested Instruction No. 15 because it erroneously suggested the jury could find good cause from the employer's subjective good faith belief as opposed to an objective standard of reasonable belief." (*Id.*)

In its Motion for Rehearing in the New Mexico Supreme Court petitioner, took the position, *for the first*

---

as they did when problems were reported. (McCormick Depo. 180-81).

Finally, David Richardson, a qualified expert on investigative techniques, (Tr. 796-97; 815-16), testified that Lew and McCormick did not observe standards of good investigative practice (Tr. 863-64). He identified numerous deficiencies in the investigation, including the failure to confirm the reports of persons interviewed; the failure to document hearsay; the failure to distinguish hearsay from rumor; the failure to follow up on and reconcile inconsistencies; the failure to keep good notes; and the failure to check the physical layout of the ranch to see if purported eye witnesses were in a position to see what they claimed to see (Tr. 892-96). He also identified specific breaches of good investigative practices (Tr. 908-18), including the failure to interview readily available key witnesses in person (*see* Tr. 909-11).

time in this litigation, that the objective standard of reasonable belief, applied by the trial court and the New Mexico Supreme Court, as a matter of state common law, is preempted by the federal statutory obligations imposed on Pennzoil by virtue of Title VII of the Civil Rights Act of 1964, as amended. *See* 42 U.S.C. § 2000e, *et seq.* Pennzoil thus claimed in its rehearing motion that federal law requires, as a matter of federal supremacy, the application of a "subjective good faith" standard of good cause, rather than an objective, reasonable basis standard, when the firing involves an allegation of sexual harassment.[3] Pennzoil's motion for rehearing was summarily denied, without any mention of the constitutional issues raised for the first time in that motion. (*See* Pet. 22a)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Federal Questions Presented in the Petition Were Not Brought to the Attention of the State Courts Below "With Fair Precision and in Due Time" So As to Confer Jurisdiction on This Court Under 28 U.S.C. § 1257.

Pennzoil contends that "[a]t all stages of the proceedings below," it took the position that liability could not be imposed on it because the action taken against Mr. Kestenbaum—i.e., his firing—was required by federal law, and therefore preemptive of his contractual rights under state law. (Pet. 7) This is just not the case. In fact, the only time the federal preemption/supremacy issue was squarely presented to the state court was in Pennzoil's Motion for Rehearing in the state supreme court. At that juncture it came too late to confer appellate jurisdiction on this Court. *See Radio Station*

[3] *See* Pennzoil's Brief in Support of the Motion for Rehearing at 1. Pennzoil also framed its new-found federal claim as a due process violation but that claim was no more than a reiteration of its preemption/supremacy claim. *See id.* at 5-6.

WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). Furthermore, under New Mexico's appellate regime, which bars presentment of new matters on rehearing, *see State v. Curlee*, 98 N.M. 576, 579, 651 P.2d 111, 114 (Ct. App. 1982) ("it has been an unwavering rule in this jurisdiction for almost seventy years that new points may not be presented in a petition for rehearing."), the state supreme court's summary denial is properly deemed no more than a state court recognition that the federal question was not considered because of a state procedural rule applied consistently and evenhandedly. *Compare Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982).

In fact, the concepts of preemption and supremacy were never mentioned either pretrial or at trial. In Pennzoil's first three recitations to points at which the federal questions were supposedly raised—their partial summary judgment motions, and the pretrial statement (*see* Pet. 8-9)—neither supremacy nor preemption were ever mentioned.[4] Similarly, at the directed verdict stage, the only recitation of counsel for Pennzoil was to the duties imposed on an employer when confronted with accusations of sexual harassment, without any mention of premeption/supremacy. (*See* Tr. at 2177-78, *quoted in full* at Appendix A, *infra*)

Most important, at the time the jury instructions were settled, when the focus of attention turned to Pennzoil's requested instruction number 15, dealing with the subjective good faith standard, there was not one word of

[4] The summary judgment memorandum on the claim of intentional interference with contractual relations, (*see* Pet. 8), only pointed to the Title VII basis for the investigation, and, in any event, the claim of intentional interference with contractual relations was removed from the case on directed verdict. (Tr. 2249) Also, Pennzoil's summary judgment memorandum only spoke to its duty to investigate and take appropriate actions (Pet. 8-9) and its pretrial statement merely reference that the federal law and regulations were "involved in this matter." (Pet. 9)

contention or argument dealing with preemption or supremacy.[5] (*See* Tr. 2487-91, *quoted in relevant part* at Appendix B, *infra*). Indeed, counsel for Pennzoil not only did not raise those issues, he affirmatively approved the reasonableness standard which the trial court adopted and submitted to the jury. *See* Appendix B, *infra*.

Only after judgment was entered did Pennzoil, in its memorandum in support of its motion for new trial, (R.P.-533) make its first vague reference to the frustration of the purpose of Title VII. (Pet. 10) Even that general statement, however, was only in support of an erroneous contention that the trial court had placed the burden on the employer to prove that the employee was "guilty of sexual harassment," (*id.*), when in fact no such burden had been placed on petitioners. Thus, the trial court had every right to reject that argument, wholly independent of any vague implication of preemption.

Furthermore, any claim that the good faith belief standard was compelled by federal law, assuming it was raised in the new trial argument, comes too late. Under New Mexico procedures, arguments over the jury instructions must be made prior to submission of the case to the jury and with sufficient precision to "specifically guide the mind of the trial court to the claimed vice . . . so that it may be corrected." *Poorbaugh v. Mullen*, 99 N.M. 11, 17, 653 P.2d 511, 517 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982).

Not only was the preemption/supremacy issue not raised at trial, but also, it was not argued in the direct appeal to the New Mexico Supreme Court. It is not insignificant that Petitioners do not cite to their Brief-in

[5] Contrary to Pennzoil's suggestion, (*see* Pet. 9-10), Petitioners' requested instruction 14 had nothing to do with the sexual harassment charge. It only related to their disproved alternative charge that Mr. Kestenbaum engaged in illegal conduct in the service of liquor to minors. (*See* Pet. 14a-15a)

Chief, (*see* Pet. 11) because a cursory review of the relevant portions of that document (*see* Appendix C, *infra*), makes clear that no such preemption/supremacy claim was ever made in the appellate court. Issues raised but neither argued nor supported by authority on appeal are deemed abandoned in New Mexico. *E.g., Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

Under these circumstances, it is clear that the federal claim was not "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Furthermore, even if sufficiently raised in the trial court, the federal questions were waived in the appellate court by Pennzoil's failure to assign them as errors or argue them as points in their brief. *See Beck v. Washington*, 369 U.S. 541, 553 (1962); *Novak v. Dow, supra.*

The important policies which underlie the jurisdictional requirement, contained in 28 U.S.C. § 1257(3), that the federal claim be "specially set up or claimed" would be undermined by the granting of certiorari in this case. First, there is no record on the proposed federal questions because the record "was not compiled with those questions in mind," *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Second, the state court's were deprived of any opportunity to consider any adequate and independent state ground, which could render unnecessary any Supreme Court review, *see Illinois v. Gates*, 462 U.S. 213, 222 (1983). Third, and perhaps most important, granting the writ in this case would undermine the fundamental principle, rooted in our Federalism, that state courts are competent and appropriate forums for the adjudication of federal constitutional claims in cases which arise in the state system. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980).

This Court has an independent duty to examine the record to satisfy itself that the federal questions were fairly raised in the court below. *See Exxon Corp. v.*

Eagerton, 462 U.S. 176, 181 n.3 (1983). Upon that examination, it is clear that the issues were never fairly raised in the trial court or in the normal course of the appeal, *Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970), thus barring petitioners from seeking further review in this Court under section 1257(3).

In this case Pennzoil could have presented its federal claims to the trial court and the state supreme court, to allow those courts a fair opportunity to consider those claims. It failed to do so; it fought this case on state common law grounds; and only after a final decision by the New Mexico Supreme Court did it seek to add the federal claims, in a vain attempt to gain yet further appellate review by way of certiorari to this Court.

II. Even If the Federal Questions Had Been Properly Presented and Preserved Below, There Are No Compelling Reasons to Grant the Writ in This Case, Because Federal Law Does Not Mandate the Firing of an Employee Where the Employer Has No Reasonable Basis to Believe That the Employee Is Guilty of Sexual Harassment.

Assuming that Pennzoil's federal questions were properly presented and preserved below, those claims are so patently lacking in merit that there can be no compelling reason to grant the writ in this case. Even a cursory analysis of Pennzoil's petition shows that this case presents no issues of preemption, supremacy or due process worthy of this Court's plenary review.

Pennzoil's entire argument rests on its contention that Mr. Kestenbaum's judgment for breach of contract under state common law, "is inconsistent with Title VII, since *Pennzoil's actions*, which formed the basis for the jury's finding of breach of contract, *were required* by Title VII." (Pet. 12) (Emphasis added.) Thus, petitioners' entire argument—whether based in preemption/supremacy, (Pet. 13), or in due process, (Pet. 17)—is built on

the fundamental premise that the federal Civil Rights Statute *required* them to discharge Mr. Kestenbaum,[6] even though they lacked a reasonable basis for their belief that he engaged in sexual harassment.

There is nothing in the Civil Rights Act itself, nor in the legislative history which evidences that Congress ever intended the Civil Rights Act provisions against sex discrimination to foreclose a state court from applying a "reasonable grounds for belief" standard when judging whether there exists sufficient good cause to allow an employer to fire an employee accused of sexual harassment. Similarly, there is nothing in the federal law, federal regulations, legislative history, or federal agency decisions, which indicates that federal law compels a "subjective good faith belief" standard in such cases. As a result, the premise underlying Pennzoil's federal claims is false. All of Pennzoil's arguments must therefore fail, because they are all based on this totally incorrect premise.

It is not surprising that petitioner points to nothing in the statute, the legislative history of Title VII, the implementing regulations, or the cases construing the act, which support such a contention, because there is no such authority. Indeed, the provisions of the law suggest just the opposite. First, Congress has explicitly provided that Title VII shall not have preemptive effect, except to the extent state law "purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7. *Cf. California Federal Savings & Loan Ass'n v. Guerra*, 93 L. Ed. 2d 613, 633 (1987) (Scalia, J., concurring) (Title VII preemption provisions "are more precisely *antipre-emption* provisions, prescribing that nothing in

---

[6] Indeed, there are a host of disciplinary actions short of termination, which, in the appropriate case, could meet an employer's Title VII obligations to take "appropriate corrective action." 29 C.F.R. § 1604.11(d).

Title VII . . . shall be deemed to preempt state law unless certain conditions are met."); *Frazier v. Colonial Williamsburg Foundation*, 574 F. Supp. 318 (E.D. Va. 1983) (no preemption when fired worker sues both for violation of Title VII and breach of contract without cause). Second, the applicable federal regulations make clear that Title VII imposes liability upon employers for acts of sexual harassment committed by employees, *only if* the employer "knows or should have known" of the acts and fails to take "immediate and appropriate remedial action." 29 C.F.R. § 1604.11(d). By use of the terms "know or should have known" the federal regulation thereby incorporates the very objective, reasonable basis standard which was applied by the trial court in this case.

Against this statutory backdrop—and with nothing further in the law, legislative history, or cases to point to a contrary intent of Congress—this Court should be "reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *see Schwartz v. Texas*, 344 U.S. 199, 203 (1952) ("The exercise of federal supremacy is not lightly to be presumed.")

Furthermore, far from undercutting Title VII, the judgment and proceedings in this action scrupulously followed the language of Title VII and fostered the policies underlying the statute. The trial judge submitted instructions to the jury in this action which detailed the contents of Title VII. (Instruction No. 13, at R.P. 494) The instructions then explained that if a supervisor sexually harassed a subordinate, that conduct would constitute a violation of federal law (*see* Appendix D, *infra*), which, when brought to the attention of the employer, would require the employer "to investigate and take prompt appropriate remedial action." (*Id.*) The trial judge even went so far as to remind the jury, in a separate instruction, that "Evidence in a case involving sexual harassment is typically contradictory. Nonetheless,

the employer still has the duty to take action to prevent sexual harassment." [7] (*Id.*)

Thus, the jury in this case was fully informed of Pennzoil's Title VII obligations, so that it could weigh those obligations in its determination of whether Pennzoil had reasonable grounds to believe that sufficient cause existed to justify firing Mr. Kestenbaum. The judge correctly concluded that apprising the jury of these Title VII influences on Pennzoil struck a proper balance between the interest in rooting out sexual harassment and the no less compelling interest in assuring that workers' contractual rights to job security not be infringed under the guise of a mere subjective belief of employee misconduct, unsupported by any reasonable basis to support the allegations.

Indeed, the trial court's insistence on the "reasonable employer" test is precisely the standard used in *French v. Mead Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 635, 639-40 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985), a case which petitioners incorrectly cite as authority for the proposition that a mere good faith belief of guilt, no matter how unreasonable, shields employers from liability for erroneous and unreasonable determinations that sexual harassment occurred.[8] (*See* Pet. 19).

---

[7] The trial court went even further and set forth the relevant portions of the EEOC guidelines. (Instruction 14, R.P. 495-96).

[8] So too, petitioners misconstrue the ruling in *Mughal v. Chart House, Inc.*, No. 85-5396 (N.D. Ill., August 27, 1986), the only other case they cite to support their due process argument. (*See* Pet. 17-20) In that opinion, the trial court set aside a jury verdict favorable to plaintiff on his claim for wrongful discharge. The court did so because of the absence of proof that "defendant knew or should have known, at the time of plaintiff's discharge, that the charges were unfounded." (Unpaginated LEXIS printout) Thus, the court used the objective standard rather than subjective good faith to test the employer's liability.

In this case, the New Mexico courts only rejected Pennzoil's contention that subjective good faith, no matter how unreasonable, provides a shield from breach of contract actions by employees who can be fired only for good cause. The court did not impose strict liability. Instead, it ruled that the employer who erroneously fires an employee charged with sexual harassment will not be liable to the employee unless the employer was not only wrong, but also lacked a reasonable basis to believe that the employee was acting wrongfully. (*see* Pet. 16a)

Finally, as a matter of policy, petitioners' position makes no sense. The federal law attempts to rid the workplace of the evils of sexual harassment; it does not serve to provide employers with an immunizing shield for the dismissal of unwanted employees. If "subjective good faith belief" were the standard for dismissal of employees accused of sexual harassment, then mere accusations of sexual harassment—if instinctively believed by the employer—would be sufficient to dismiss employees unjustly accused of that conduct.[9] Reason must temper instinct. The ruling of the New Mexico Supreme Court requires this and no more.

Under these facts and circumstances, Pennzoil presents no substantial federal questions which merit the plenary review of this Court. There is no conflict with Title VII presented here; there is no federal question which needs settling by this Court; and there is no de-

---

[9] Petitioners, for the first time in the entire proceedings, also present to this Court a new standard, contradictory to the subjective good faith standard they urged below. (*See* Pet. 26-27) Their new proposal seeks to import principles forged in tort law in light of the First Amendment, into a contract claim having no free speech implications. It is also based on the false assumption that New Mexico leaves employers with only one defense—"that the allegations of sexual harassment were in fact true." (Pet. 26) To the contrary, New Mexico permits the defense that, though the charges were false, the employer had a reasonable basis to believe that they were true. (*See* Pet. 16a)

cision which is in conflict with the decisions of either this Court or the federal courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRIS KEY
(Counsel of Record)
211 Twelfth Street, N.W.
Albuquerque, N.M. 87102
(505) 242-9097

KACEY DENOI
160 Washington, S.E.
Albuquerque, N.M. 87108
(505) 226-8525

MICHAEL B. BROWDE
MARIO E. OCCHIALINO
1117 Stanford, N.E.
Albuquerque, N.M. 87106
(505) 277-5326
Counsel for Respondent

APPENDICES

APPENDIX A

ENTIRE DISCUSSION OF FEDERAL LAW IN PENNZOIL'S ARGUMENT ON ITS MOTION FOR DIRECTED VERDICT
Tr. 2177-78

MR. HUDSON for Pennzoil:

Given this evidence we must now look at the position of the employer. It cannot be questioned that upon receipt of the evidence, the employer has the duty to investigate and to take prompt, appropriate, remedial action. It is recognized that—by the EEOC guidelines and by all the courts, that the facts in a sexual harassment case are always contradictory. It's always fact-defensive, and it has to be made on a case-by-case basis. Nonetheless there is a potential liability for the employer, if a claim is filed, and he does not handle the allegations properly. There is also an implicit obligation within Title 7 to protect employees from discrimination, whether it's sexual, racial, religious, or any kind; and in this case, you know, we were dealing with many young, female employees. In addition the employer was not faced with simply an isolated instance, but with a number of instances of different kinds of sexual harassment.

APPENDIX B

RELEVANT PORTIONS OF PENNZOIL'S ARGUMENT IN SUPPORT OF ITS REQUESTED INSTRUCTION 15
Tr. 2487-91

MR. SHANOR for Pennzoil:

Well, it's proffered to the Court as a statement of the law as we view it, and it's definitely an issue in the case, as to whether or not it is the obligation of this defendant to prove in fact that Mr. Kestenbaum was guilty of sexual harassment, as opposed to our obligation to prove that we had a reasonable belief that the charges were substantiated to provide a reason for the discharge, and—

THE COURT: Mr. Shanor—I'm sorry. I didn't mean to interrupt you.

MR. SHANNOR: That's all right.

THE COURT: I'm not sure that we disagree, but I'm not sure that I agree, either. The plaintiff in this case bears the burden of proving, if there was a good-reason requirement to fire him, that he was fired for what was not a good reason. The employer can defend, it would seem to me, by showing there was, in the context of all that occurred, happened, a good reason; that is to say, the employer may defend by showing that the plaintiff, of course, failed by a preponderance of the evidence to establish that he was not fired for a good reason. A good reason the Court thinks can go into all of the matters that have been recited into evidence, everything that happened.

* * * *

I think this injects an erroneous issue—I'm sorry. I think this is not a correct statement of the law as it is now, and I think also it injects a false issue; but do you mean—do you mean by this, Mr. Shanor, so that we'll

all understand, that if the jury finds that there was no good reason to fire Mr. Kestenbaum of any kind, assuming the jury goes both to mismanagement and sexual harassment, but they are persuaded that subjectively the corporation thought there was good reason, that in such situation, the jury may find that the firing was proper?

MR. SHANOR: Not precisely, Your Honor. If I might go back and phrase it this way, it seems to me that the whole thrust of this case, as it's been presented by the plaintiff, is to disprove the question of whether or not Mr. Kestenbaum was guilty or not of sexual harassment. That's the way the case has been postured, all the way along. The purpose of this instruction is to clarify for the jury that it is not the obligation of this defendant to prove that he was in fact guilty of sexual harassment, but rather that based upon the facts reasonably considered by the employer, that they had reasonable cause to believe that he was guilty of that or mis-management, and that that was sufficient reason, and that this defendant doesn't have to prove in fact that it was sexual harassment after the fact in this court.

THE COURT: Well, I think this is just a restatement of the instruction that will be given, 3.1, that good reason—that the plaintiff has to prove by a preponderance of the evidence that good reason did not exist to fire him, and that you in turn claim that there's no showing that the corporation failed to have good reason in the firing. I think this is just surplusage, there.

MR. SHANOR: But I think the jury—the natural instinct of the jury in a case such as this is to think that the issue is, did he in fact commit sexual harassment or did he not, and the purpose of this instruction is to clarify for the jury that that is not really the issue. The issue is whether or not there was reasonable basis for the employer to think that sexual harassment had occurred, whether or not, based upon evidentiary matters, as it comes to the courthouse, would support sexual harassment.

THE COURT: Mr. Shanor, you may argue to the jury that the employer had a reasonable basis in the evidence for the conclusion that there was mismanagement and sexual harassment and that this constitutes a good reason; and I think that this is just an evidentiary matter at this point. I'm going to refuse the instruction. I appreciate your concern, particularly because an employer is involved, and because a large employer is involved, but I think it just—it clutters up the instructions, and you will have the opportunity to present a clean instruction to be refused. I think you've got your objections down very clearly for the record. Your next one, please, Mr. Shanor?

APPENDIX C

RELEVANT PORTIONS OF PENNZOIL'S BRIEF-IN-CHIEF IN THE NEW MEXICO SUPREME COURT
pp. i, 20-21, 28-30

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. SUMMARY OF THE PROCEEDINGS	1
II. STATEMENT OF THE CASE	3
III. ARGUMENT AND AUTHORITIES	10
A. JUDGMENT MUST BE ENTERED FOR DEFENDANTS BECAUSE THE PLAINTIFF, AS A MATTER OF LAW, WAS AN EMPLOYEE AT WILL	10
B. THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE PLAINTIFF'S CLAIM FOR BREACH OF IMPLIED CONTRACT WAS BARRED BY THE STATUTE OF FRAUDS	14
C. THE JUDGMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE	19
D. DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE OF THE COURT'S ERROR IN REFUSING REQUESTED JURY INSTRUCTIONS	26
1. The Court erred in refusing Defendant's Requested Instruction No. 13A	27
2. The Court erred in refusing Defendant's Requested Instruction No. 15	28
3. The Court erred in refusing Defendant's Requested Instruction No. 14	31

* * * *

[from Argument C—judgment not supported by substantial evidence]

Second, there is no substantial evidence to support the finding that no good reason existed to terminate the Plaintiff's employment. A consideration of the evidence and the law reveals why that is an ineluctable conclusion. Upon receipt of the anonymous letter alleging sexual harassment, the Defendants had the legal duty to investigate and take prompt and appropriate remedial action. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Barrett v. Omaha Nat'l. Bank*, 726 F.2d 424 (8th Cir. 1984); *Craig v. Y&Y Snacks*, 721 F.2d 77 (3d Cir. 1983); *Coley v. Conrail*, 34 Fair Emp. Prac. Cases (B.N.A.) 129 (U.S.D. Mich. 1982). It is the express policy of Pennzoil to prevent sexual harassment, and its occurrence can be a reason to discharge the employee. (P.E.9) The Defendants did not simply undertake a perfunctory investigation. Rather, they chose a representative of the Security Department who had conducted numerous investigations, (Tr. 380-384) and the Company's Equal Employment Opportunity representative, who was aware of the implications of sexual harassment. (Depo. of McCormick at 5-23). The investigation conducted was extensive involving the interviewing of approximately twenty-six people.

The parameters of sexual harassment, or exactly what constitutes sexual harassment are not easily definable. See, generally, *Meritor Savings Bank v. Vinson*, 477 U.S. ——, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace, 24 Washburn L.Rev. 574 (1985). The guidelines published by the Equal Employment Opportunity Commission provide one definition, 29 C.F.R. § 1604.11, that are considered "a body of experience and informed judgment to which courts and litigants may properly resort

for guidance." *Meritor Savings Bank v. Vinson, supra*, 91 L.Ed.2d at 58. Undoubtedly, physical advances are evidence of sexual harassment. Even if they are consented to, they may be unwelcome for purposes of sexual harassment. *Id.*, 91 L.Ed.2d at 60. Moreover, the employer must be concerned with its potential liability, which may even be vicarious liability in some instances, *Schroeder v. Schock*, 42 Fair Emp. Prac. Cases (B.N.A.) 1112 (U.S.D.Kan. 1986), and liability based on traditional agency principals in others. *Meritor Savings Bank v. Vinson, supra*, 91 L.Ed.2d at 63. Through the enactment of Title VII (42 U.S.C. §§ 2000e et seq.) Congress expressed a clear intent to do away with certain conduct in the workplace. It put the onus of enforcement on employers to carry through that intent. In this case, the Defendant complied with the initial duties imposed by Title VII. They were faced with evidence of different types of sexual harassment, and were put in a position by existing law where they had to make a decision based on their reasonable beliefs. It cannot now be said that there was no valid basis for that decision.

* * * *

2. *The Court erred in refusing Defendant's Requested Instruction No. 15.*

Defendants tendered their requested Instruction No. 15 which provided:

> Where an employee is terminated for a good reason, the employer does not have to prove that the reason in fact existed. Rather, the employer need only in good faith believe that the employee engaged in conduct which was inappropriate in the work place, whether or not stated by the employer as the reason for termination.

(Tr. 2487-91). The instruction, beyond being a correct statement of the law, was essential to inform the jury the position of employer at the time of discharging an employee. Indeed, it was apparently the standard that

the Plaintiff invoked in making termination decisions. (Tr. 1878). The Court committed reversible error in refusing to give the instruction.

This case is replete with issues of sexual harassment. In a case of sexual harasssment under Title VII, the employer need not prove that the employee committed sexual harassment, but only needs a reasonable belief that sexual harassment occurred. *Crimm v. Missouri Pacific Railroad Co.*, 750 F.2d 703 (8th Cir. 1984); *French v. Mead Corp.*, 33 Fair Emp. Prac. Cases (B.N.A.) 635 (U.S.D. Ohio 1983). There are many obvious reasons for that rule of law. One reason is that evidence in sexual harassment cases is almost always contradictory; that is why appellate courts will only reverse a finding where it is clearly erroneous. *Meritor Savings Bank v. Vinson, supra; Craig v. Y&Y Snacks, supra.* Another reason is trat an employer is bound to take prompt and appropriate remedial action when it receives an allegation of sexual harassment. A third reason is that the employer faces substantial liability for sexual harassment committed by management employees. *Meritor Savings Bank v. Vinson, supra* at 63; *Schroeder v. Schock*, 42 Fair. Emp. Prac. Cases (B.N.A.) 1112 (U.S.D. Kan. 1986).

The rule of law stated in Instruction No. 15 should be the same with all employment situations. *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982). An employer does not have the benefit of extended discovery, depositions, or jury trial when he makes a decision to terminate an employee. An employer must utilize available resources efficiently, and make his decision based on information available at the time. To demand that employer have a preponderance of legally admissible evidence would put an unrealistic burden on an employer. If that demand is made, it will result in all such decisions being second guessed by the courts. Clearly, that should not happen. *Kumpf v. Steinhaus, supra.*

APPENDIX D

JURY INSTRUCTIONS 16, 17 AND 18
RP-498

INSTRUCTION NO. 16

When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex in violation of the laws of the United States.

INSTRUCTION NO. 17

Where an employer receives allegations of conduct that could amount to sexual harassment, the employer has a legal duty and obligation to investigate and take prompt appropriate remedial action.

INSTRUCTION NO. 18

Evidence in a case involving sexual harassment is typically contradictory. Nonetheless, the employer still has the duty to take action to prevent sexual harassment.